



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 92 OF 2015

JONATHAN KIMANZI MUTHENGIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the conviction and sentence in Kyuso Principal Magistrate's Criminal Case No. 423 of 2014 – B.M. Mararo - PM)

J U D G M E N T

The appellant was charged in the Subordinate court at Kyuso with burglary contrary to Section 304 (2) as read with Section 279 (b) of the Penal Code. The particulars of the offence were that on the night of 17th September 2014 at Kyuso location, Kyuso sub-county within Kitui county broke and entered the dwelling house of PETER MAINA with intent to steal from therein and did steal therein one (1) Ipad, one (1) laptop, a wristwatch, seven (7) shirts, four (4) neck ties and a DVD all valued at Ksh. 103,700/- the property of the said PETER MAINA.

In the alternative, he was charged with handling stolen goods contrary to Section 322 (1) (2) of the Penal Code. The particulars of the offence were that on the 19th September 2014 at Gai shopping centre in Gai sub location, Kyuso location in Kyuso sub-county within Kitui county otherwise than in the course of stealing, dishonestly received or retained one laptop, 1 Ipad, a wristwatch, 7 shirts, 4 neckties, a DVD and two chargers knowing or having reason to believe them to be stolen or unlawfully obtained goods.

When the charges were read to him, he was recorded as having pleaded guilty. He was then convicted on the main charge and sentenced to serve 7 years imprisonment on the first limb of the charge and 3 years imprisonment on the second limb of the charge, the sentences to run concurrently.

Dissatisfied with the decision of the trial court, the appellant filed his appeal on 23rd March 2015. Before the hearing of the appeal however, the appellant filed supplementary grounds of appeal which he relied upon though he stated that he tendered these as written submissions. The grounds of appeal are as follows:-

The appellant's appeal is on the following grounds:-

1. **That he was not accorded a fair trial as stipulated in the Constitution of Kenya as he was not given enough time to reflect and digest the consequences and severity of the case before sentencing, as he was arrested taken to court charged and sentenced, and that case was conducted and verdict given in chambers.**
2. **That the charge sheet indicated that he was arrested on 17th and the alleged offence booked**

on 18th, which meant he was arrested before commission of the offence.

3. **The charge sheet was defective as he was charged with burglary but the facts did not disclose that the complainant's house or entrance was broken into.**

During the hearing of the appeal, the appellant made oral submissions. He made a correction stating that he was actually arrested on 19th September 2014 and not 17th September, as he had earlier stated. He denied having been arrested with any items. He submitted that he was arrested on 19th September 2014 at 5 p.m. and taken to the police station, and then taken to court at 9.30 a.m. where he was taken into a room by the prosecutor who persuaded him to accept the offence and promised that he would be forgiven. According to him that was how he was unfairly convicted and sentenced.

Learned Prosecuting Counsel Mr. Okemwa, opposed the appeal. Counsel contended that the plea of guilty of the appellant was properly recorded and emphasized that the items stolen were produced as exhibits 1 – 6. Counsel emphasized that the appellant accepted the facts as summarized in court, and therefore the plea of guilty was unequivocal. The sentence was also lawful.

Counsel however asked the court to peruse the entire record, as this is a first appellate court.

I have considered the appeal of the appellant and arguments on both sides.

As a first appellate court, I am duty bound to re-evaluate the evidence and entire record and come to my own conclusions and inferences – see **Okeno – Versus – Republic (1972) EA 32.**

The appellant is recorded as having been convicted on his own plea of guilty. The steps to be taken by a court to ensure that a plea of guilty is unequivocal were clearly stated in the case of **ADAN – VERSUS – REPUBLIC [1973] EA 445.**

The appellant has complained that he was unfairly persuaded by the prosecutor to plead guilty. There is however no indication on record that he was so unprocedurally influenced. I dismiss that ground.

The appellant has complained that the proceedings were held in chambers, thus violating his Constitutional rights. The record does not indicate that proceedings were conducted in chambers. Even if that allegation were true, that fact alone would not be a violation for the appellant's Constitutional rights. There might be situations where it is necessary or convenient for a court to hold proceedings in chambers, such as when there is no open court available on a particular day.

The appellant has complained that the charge is defective. I have perused the charge sheet. The statement of the offence is given as “*burglary contrary to Section 304 (2) as read with Section 279 (b) of the Penal Code.*” In the particulars of the offence however, it was alleged that the appellant broke and entered the dwelling house of PETER MAINA with intent to steal from therein and did steal therein.

Since the statement of offence talked only of burglary, it was wrong for the particulars of offence to include the element of theft. Burglary is a complete offence in itself. Merely mentioning of the Section of theft, that is Section 279 (b) of the Penal Code in the statement of offence did not cure the irregularity. What was to be read and explained to the accused was the offence itself, which he was required to understand and plead to and not the section of the law creating the offence. What happened herein was that the offence read to the appellant was only that of burglary which he could plead to. He could not plead to the offence of theft, which was not read and explained to him. On that account, the charge was objective.

In addition to the above, the facts narrated by the prosecutor did not disclose that the appellant broke or entered the house of the complainant, in order to steal the items. The offence of burglary could only be committed where there is breaking of or opening of the complainant's house. Though he might have been found with the items allegedly stolen, the facts do not disclose the offence of burglary, which meant that the appellant could not also be convicted of burglary.

Though the appellant pleaded guilty and was convicted, the plea cannot in my view be said to be unequivocal in view of the above factors. The learned magistrate thus erred in convicting him.

The sentence of 7 years imprisonment cannot be sustained as the facts did not disclose an offence of burglary. The sentence of 3 years imprisonment cannot also be sustained as the appellant was not charged with an offence of theft.

Though this appeal has been allowed on a technicality, a retrial is not called for, as the appellant has been in custody from September 2014, and the alleged stolen items were recovered.

I thus allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 4th May 2016

GEORGE DULU

JUDGE